Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: George Willoughby

Date of Birth: April 24, 1993

Dates of Hearing:
March 2, March 3, April 12, April 13, April 26
2010

CLOSED HEARING

ODR Case # 10264-08-09-AS

Parties to the Hearing:	Representative:
Mr. & Mrs. Robert & Agnes Peiffer 25 Sulpher Springs Road Duncannon, PA 17020	Yvonne Husic, Esq. 2215 Forest Hills Drive Suite 35 Harrisburg, PA 17112
Ms. Holly Sawyer Susquenita School District 1725 Schoolhouse Road Duncannon, PA 17020	Frank Clark, Esq. Clark & Krevsky 20 Erford Road Suite 300A Lemoyne, PA 17043
Date Record Closed:	May 28, 2010
Date of Decision:	June 12, 2009
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

George Willoughby ("student") is a 17-year old student residing in the Susquenita School District ("District") who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA") and Pennsylvania special education regulations ("Chapter 14").[1] The parties agree that the student qualifies under these provisions of law. The parties disagree over the student's past and current special education programming. Specifically, the student's parents allege that, through multiple acts and omissions, the District has denied the student a free appropriate public education ("FAPE") as required under IDEIA and Chapter 14. Additionally, the parents allege that those acts and omissions have violated the District's duties under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as "Section 504").[2] Parents seek compensatory education as a result of these alleged deprivations. The District counters that at all times it has provided a FAPE to the student and met its obligations under IDEIA, Chapter 14, and Section 504.

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[1] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.164.

[2] It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See also 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for the protection of "protected handicapped students". 22 PA Code §§15.1, 15.10.

Parents' claimed compensatory education in excess of two years. The first hearing session was devoted to evidence on the scope of the parents' claims pursuant to 34 C.F.R. §§300.507 and 300.511(f). As a result of the evidence presented, the District was found not to have misrepresented or withheld information regarding the student's special education program. Therefore, the scope of the hearing, and any potential recovery, were limited to a period after June 25, 2007 (two years prior to the date parents' complaint was filed).

Finally, by way of explanation, written closing statements (and therefore the closing of the record) were initially due May 18th. Due to an issue where transcript volumes provided by the court reporting agency could not be accessed by parents' counsel, the due date for closings was extended to May 25th. Thereafter, parents' counsel was ill and asked for an extension to submit closing arguments. The extension was granted, and both parties were given until May 28th to submit written closing statements.

For the reasons set forth below, I find in favor of the parents and student.

ISSUES

Has the student been denied a FAPE by the District under the terms of IDEIA/Chapter 14 and/or Section 504?

Has the student, on the basis of handicap, been excluded from participation in, been denied the benefits of, or otherwise been subjected to, discrimination on the part of the District under the terms of Section 504?

If the answer to either or both of these two questions is in the affirmative, is compensatory education owed to the student?

FINDINGS OF FACT

1. The student has been identified as a student with attention deficit hyperactivity disorder ("ADHD"), multiple learning disabilities, and speech and language disorder. (Parents' Exhibit ["P"]-3, P-8, P-37).

2. The student has been receiving special education and related services in the District for a number of years. (P-2, P-3).

3. In September 2005, when the student was in 6th grade, the student was re-evaluated by the District. (P-8).

4. The student's reading was assessed using the Gray Oral Reading Test and results were reported as grade equivalents. The student's grade equivalent was 2.7 in reading rate, 4.0 in reading accuracy, 3.2 in reading fluency, and 6.0 in reading comprehension. (P-8).

5. The student 5th grade scores on the Pennsylvania System of School Assessment tests ("PSSA") were below basic in reading and math. (P-8).

6. There was no testing or assessment of the student in the area of mathematics. (P-8).

7. At that time, the student was receiving speech and language services but only for articulation, not substantive expressive/receptive language. (P-8, P-9).

8. The student's individualized education plan ("IEP") in effect on June 25, 2007 was dated October 2006. The 2006-2007 school year was the student's 7th grade year. (P-16).

9. The present levels of educational performance ("PLEPs") include an assessment of the student's reading using the Gray Oral Reading Test reported as grade equivalents. The student's grade equivalent was 2.7 in reading rate, 4.7 in reading accuracy, 3.4 in reading fluency, and 4.2 in reading comprehension. (P-16 at page 4).

10. The PLEPs show that the student's 6th grade scores on the PSSAs from the prior year were below basic in reading and math. (P-16 at page 4).

11. The IEP notes that the student continues to need improvement in written expression. (P-16 at page 4).

12. The lone IEP goal in reading related to reading fluency, calling for the student to read 120 words at the 5th grade level with 95% accuracy. (P-16 at page 10).

13. The IEP contain one goal in written expression. (P-16 at page 11).

14. The student received speech and language therapy and two of the student's four IEP goals involved speech and language. (P-16 at pages 8, 9, 13).

15. There was no goal in mathematics. (P-16).

16. The October 2006 IEP did not include extended school year ("ESY") programming for summer 2007. The IEP indicated: "Not enough information has been collected to determine a need for ESY services. This will be revisited prior to next IEP to determine rate of recoupment and retention." Over the course of the 2006-2007 school year, there was no data collected on recoupment/regression. (P-16 at page 14.)

17. In October 2007, the IEP team met for its annual revision of the IEP. This was at the outset of the student's 8th grade year. (P-23).

18. The PLEPs include an assessment of the student's reading using the Gray Oral Reading Test reported as grade equivalents. The student's grade equivalent was 3.7 in reading rate, 5.4 in reading accuracy, 4.4 in reading fluency, and 6.7 in reading comprehension. (P-23 at page 4).

19. The PLEPs show that the student's 7th grade scores on the PSSAs from the prior year were below basic in reading and math. (P-16 at page 4).

20. The student failed to meet the goal in reading fluency from the previous IEP. The goal of 120 words correct at 95% accuracy was recorded; the present level in October 2007 was 76 words

correct. The PLEPs note: "(S)o the goal should remain". (P-23 at page 4).

21. The student failed to meet the goal in written expression from the previous IEP. The PLEPs note: "(S)o the goal should remain." (P-23 at page 4).

22. The student was exited from speech and language services. (P-23 at page 4, 14).

23. The student's goals in reading fluency and written expression in the October 2007 IEP are identical to the goals in the previous IEP. (P-16, P-23).

24. There was no goal in mathematics. (P-23).

25. The IEP indicated that transition services for the student were part of the student's program, but there was no transition plan. (P-23 at pages 3, 6).

26. On October 31, 2007, an IEP review recommended that the student be allowed to use a calculator for non-basic math facts on any math assessment. (P-23 at page 16).

27. The student made progress on the reading fluency and written expression goals in the 2007-2008 school year. (P-18 at pages 3-4, P-29 at pages 5-6).

28. The student was found not to be eligible for ESY services in summer 2008 even though no recoupment/regression data was collected or analyzed. Year-long progress monitoring data, however, suggests that the student experienced regression over the 2007/2008 holiday break. (P-23 at page 9, P-18 at pages 3-4, P-29 at pages 5-6).

29. At the time of the next-scheduled re-evaluation, in September 2008, the parties agreed to waive the re-evaluation. (P-30; Notes of Testimony ["NT"] at 537-541, 941-945).

30. In October 2008, the IEP team met for its annual revision of the IEP. This was at the beginning of 9th grade, the student's first year of high school. (P-31).

31. The PLEPs in the October 2008 IEP did not include, as in past years, scoring from the Gray Oral Reading Test. (P-31 at page 8).

32. The PLEPs show that the student's 8^{th} grade scores on the PSSAs from the prior year were basic in writing and below basic in both reading and math. (P-31 at page 8).

33. The IEP noted that the student made progress on the reading fluency and written expression goals in the previous year. (P-31 at page 8).

34. The reading fluency goal, however, changed in the October 2008 IEP. It read: "Given a reading passage at the 5^{th} grade level, (the student) will read 100 words in one minute, 3 consecutive times). (P-31 at page 13).

35. The written expression goal also changed. (P-31 at page 13).

36. There was no goal in mathematics. (P-31).

37. The student's math teacher reported: "Always respectful, usually pays attention to lessons, usually on-task, seems to grasp the concepts at the moment. Needs a lot of repetition, forgets concepts from day to day. We gave (the student) a notes template since (the student) did not have any notes during (the) last notebook check. It would be wise to purchase a set of integer flash cards for (the student) to use every day for about 5-10 minutes to keep integer operations clear in (the student's) mind." (P-31 at page 7).

38. There were no speech and language services in the IEP. (P-31 at page 16).

39. The student was found not to be eligible for ESY services in summer 2009 even though no recoupment/regression data was collected or analyzed. (P-31 at page 18).

40. The District issued a notice of recommended education placement ("NOREP") for the October 2008 IEP on October 2, 2008, with parents agreeing to the IEP and placement on October 8, 2008. (P-32).

41. The student had been interested in taking a keyboarding class upon entering high school. At the outset 9^{th} grade, the student was taking the class and, at the time of the October 2008 IEP meeting, was earning a 91% in the class. (P-31 at page 5; NT at 528-532, 543-544, 553-554).

42. On October 29, 2008, a letter was sent the parents, indicating that the student, along with all other underclass students, had taken on October 7th and 8th a 4Sight assessment "to predict how your student will perform of (*sic*) the (PSSAs) given in the junior year." The student's predictive scores showed that the student had performed below basic in reading and math. (P-35).

43. Given these 4Sight scores, the District, through school board policy, required students who performed below basic to take mandatory remedial classes called "standards classes". (P-35; NT at 1226-1229).

44. As a result, as of October 7, 2008, the student was removed from the keyboarding class and a resource class (a planning/organization period at the end of the day) and placed in Standards English and Standards Math. The decision to change the student's schedule was unilateral on the District's part. There was no consultation with parents or participation of the IEP team before the student was placed in standards classes. (P-35, P-36 at page 1; NT at 557, 572-573, 1084-1087).

45. Students receive academic credit for the standards classes and are graded for the classes. (School District Exhibit ["S"]-17; NT at 1271-1277).

46. A student may exit from the mandatory standards classes if they (1) achieve two consecutive proficient or advanced scores on the particular 4Sight assessment(s) where the student did not achieve proficiency and (2) earn a B in the standards class. Otherwise, the student must remain enrolled in the standards class. (P-35; NT at 1271-1277).

47. On October 22, 2008, the student's mother contacted the District's director of special education regarding the insertion of the standards classes at the expense of the keyboarding class and resource class, voicing her displeasure over the scheduling changes. (P-43 at pages 25-26; NT at 542-545).

48. On December 4, 2008, the parents met with the District superintendent and other members of the IEP team. The meeting was not successful in resolving the dispute regarding the scheduling issue. (P-43 at 33-34; NT at 569-571).

49. The student continued in the standards classes through the remainder of the 2008-2009 school year. (S-17).

50. In January 2009, a psychiatric evaluation report for the student was issued (and subsequently updated in February 2009). The evaluation noted language, reading, and mathematics disorders, adjustment disorder with anxious mood as well as ADHD. (P-6).

51. In March 2009, when the student was nearly sixteen, a speech and language evaluation report for the student was issued. The student's results on the Language Processing Test showed significant difficulties on the associations, categorization, similarities, differences, and attributes subtest where the student's age equivalencies ranged from 8 years-1 month to 12 years-4 months, with a total test age equivalency of 10 years-10 months. The student's results on the Comprehensive Assessment of Spoken Language showed significant difficulties on all three subtests (syntax construction, sentence comprehension, and grammaticality judgment) where the student's age equivalencies ranged from 9 years-8 months to 10 years-10 months. (P-4).

52. The speech and language report concluded: "(The student) presents with significant impairments in receptive and expressive language skills with significant difficulties involving auditory and language processing skills. (The student) would benefit from speech and language intervention twice weekly as well as supports within the classroom." (P-4 at page 4).

53. In March 2009, a neuropsychological evaluation report for the student was issued. (P-3).

54. The evaluator administered a number of assessments, including intellectual testing, academic achievement testing, behavioral and emotional functioning, attention testing, executive functioning, memory and learning, language, and visual-perceptual/spatial testing. (P-3 at pages 11-19).

55. The student's full-scale IQ was reported as 73 on the Wechsler Intelligence Scale for Children – 4th Edition. The evaluator opined that due to the significant amount of scatter on the subtests, the student's IQ score was most likely skewed downward and that the actual IQ score is most likely higher. (P-3 at page 35; NT at 390-391).

56. The student's academic achievement was measured with the Woodcock-Johnson Test of Achievement- 3rd Edition. The student scored in the 4th percentile for broad reading, the 5th percentile for basic reading skills, and the 9th percentile for reading

comprehension. The student scored in the 5th percentile for broad math and the 3rd percentile for math calculation skills. The student scored in the 2nd percentile for broad written language and the 2nd percentile for written expression. (P-3 at page 36).

57. The evaluator made a number of recommendations regarding the student's educational programming but highlighted "three primary issues that are contributing to (the student's) academic struggles": ADHD-Combined Type, language processing, and anxiety. (P-3 at pages 19-21).

58. As to ADHD, the evaluator opined: "Specifically, when responding to information that comes through both (the student's) ears and...eyes, (the student) experiences extreme difficulty with making accurate responses, staying focused, and sustaining attention....In particular, (the student) experiences extreme difficulty with maintaining consistency in the speed and accuracy with which he responds to visual, and even more so, auditory information." (P-3 at page 20; NT at 395-400).

59. As to language processing, the evaluator opined: "On an assessment of verbal learning and memory, (the student's) performance suggested that both difficulty with encoding and recall of verbal information were problematic....On the same assessment, (the student) also demonstrated remarkable vulnerability to interference effects, meaning that (the student) is unable to adequately learn new information when it is presented in close proximity of (*sic*) previously presented information. Without a fundamental basis of language processing skills, it is no wonder that (the student) has experienced considerable academic difficulty on a variety of levels." (P-3 at page 21; NT at 408-411).

60. As to anxiety, the evaluator found that developmentally, the student was encountering many questions about the future. The evaluator opined: "(The student) does not appear to trust...(that the student can) function independently as an adult at a time when (the student) is challenged to make plans in anticipation of this upcoming phase...of life." (P-3 at page 21; NT at 413).

61. The evaluator also opined that the student is likely to encounter difficulties in mathematics instruction at higher levels (such as algebra and geometry) and requires concrete, sequential instruction with an emphasis on repetition. (P-3 at page 36, NT at 414-416).

62. In April 2009, the District issued a re-evaluation report. (P-37).

63. The student's PSSA scores for 8th grade indicated that the student scored below basic in reading and mathematics. (P-37 at page 8).

64. The re-evaluation report considered the findings of the February 2009 psychiatric report. (P-37 at page 1).

65. The neuropsychological report of March 2009 was partially considered, but the report had not been finalized so it could not be considered in its entirety. (P-37 at page 1).

66. The speech and language report of March 2009 was presented to the District but was not considered in the re-evaluation report. (P-37; NT at 580-581, 587).

67. The District conducted its own cognitive and achievement testing of the student. (P-37 at pages 5-6).

68. Regarding the student's reading achievement, the District evaluator opined: "(The student) had difficulty with decoding unknown words; (the student) did not employ any specific strategy for decoding. When asked to read passages and then answer questions, (the student) had great difficulty answering those questions and (the) responses were often unrelated. (The student) seemed to have difficulty understanding what was being asked. Defining words was a challenge." (P-37 at page 5).

69. Regarding the student's math achievement, the District evaluator opined: "In math, (the student) did not attempt any long division or fraction problems. When asked questions through word problems..., (the student) again had difficulty often understanding what was being asked. (The student) did not use paper and pencil for computation seemingly because (the student) did not know where to start solving." (P-37 at page 5).

70. Regarding the student's achievement in written expression, the District evaluator opined: "(The student's) writing skills are also deficient. (The student) has difficulty simplifying sentences and either just copies what is written or will write very little. (The student's) sentence structure is awkward and inappropriate which does detract from the meaning (the student) is trying to convey. When asked to write a letter to the editor of a school paper, (the student) wrote one sentence—16 words....When verbally asked to

expand on (the) writing..., (the student) had difficulty formulating a verbal response as well and answered in a word or word phrase." (P-37 at page 6).

71. The student was identified as requiring special education for deficits in reading, math, and written expression. (P-37 at page 6).

72. The re-evaluation included speech and language testing by a contractor working for the District. The evaluator concluded that the student had deficits in expressive and receptive language. (P-37 at page 7).

73. The re-evaluation report identified the student as having specific learning disabilities in reading, mathematics, and written expression, with a secondary identification for speech and language. (P-37 at page 10).

74. By letter directed to the District's director of special education, the parents formally objected in writing to certain elements of the re-evaluation report. (P-37 at pages 17-18).

75. The student's IEP team met on April 29, 2009 to design the student's IEP based on the re-evaluation report. (P-38).

76. The student's April 2009 IEP included seven goals: two in speech and language, one in reading fluency, one in word decoding, one in written expression, one in career transition, and one for organization. (P-38 at pages 25-30).

77. There was no goal in mathematics. (P-38).

78. The IEP called for two 30-minute speech and language therapy sessions over a six-day academic cycle representing the high school's scheduling timeframe). (P-38 at page 20).

79. The decision on ESY programming for summer 2009 was to be "determined at a meeting on or before May 31, 2009". Such a meeting never took place, and there is nothing in the record to indicate that recoupment/regression data was collected over the 2008-2009 school year. (P-38 at page 21).

80. The parties shared emails about the IEP in early May 2009. By NOREP dated May 8, 2010, the District offered the IEP of April 29th. The parents rejected the recommendation and indicated that they would pursue mediation and due process. (P-38 at pages 36-42).

81. In May 2009, the report of an independent special education consultant was issued, based on records review, an in-school observation of the student and discussions with District personnel. (P-2).

82. The report concluded that the student's IEPs were inappropriate from the 2001-2002 school year through the 2008-2009 school year (the school year in which the report was issued). (P-2 at pages 21-22; NT at 312-317).

83. Parents filed their complaint on June 25, 2009. (P-1).

84. On August 25, 2009, the IEP team met again to consider the student's IEP. (P-39).

85. The August 2009 is virtually identical to the April 2009 IEP, although there are certain handwritten changes to the IEP that were discussed at the meeting. (P-39; NT at 603-605, 1197-1199).

86. Mother testified that the District threatened to keep the student out of the auto mechanics class at the vo-tech school that the student was scheduled to begin the next day (August 26, 2009). The District's director of special education testified that the discussion was about pendency and, without parental approval of an IEP, the last agreed-upon IEP (October 2008) would govern the student's programming, a program that did not include the auto mechanics class or the vo-tech placement. Both parties testified credibly; the difference seems to lie in a miscommunication. (NT at 603-605, 1192-1194).

87. Parents approved the NOREP and the August 2009 IEP governed the student's education program for the 2009-2010 school year. (P-39).

88. The student had a split day in the 2009-2010 school year, spending five periods in the morning at the District high school (English, geometry, Standards English, biology, and health/physical education). The student spends three periods in the afternoon in auto mechanics at the vo-tech. (P-41).

89. The student took Standards Math on Mondays and Wednesdays after school. After returning from the vo-tech on those days, the class lasted for approximately 90-105 minutes on each day, with class ending at approximately 5 PM. The teacher is not a

special education teacher, and there is no specially designed instruction for the student. (P-41; NT at 801-802).

90. To accommodate the student's speech and language sessions, the student receives speech and language therapy before school two days per week, from 7:15-7:45 AM. The IEP team, including the parents, agreed to this arrangement. (NT at 1039-1046).

91. As of February 2010, the student was making progress on the goals in career transition, word decoding, written expression, and organization. (S-24 at pages 3, 6-9, 11).

92. As of February 2010, the student occasionally reached the goal level but primarily was working inconsistently on the two speech and language goals. (S-24 at pages 14-16).

93. As of February 2010, the student was not making progress on the goals for reading fluency. (S-24 at pages 4-5).

94. There was no evidence at the hearing as to data collection on the student's recoupment/regression for a determination of ESY programming in summer 2010. (P-39).

95. By hearing officer ruling dated March 3, 2010, the scope of the hearing, and consequently the scope of parents' claims, was limited to events after June 25, 2007. (Hearing Officer Exhibit 1).

DISCUSSION AND CONCLUSIONS OF LAW

Provision of FAPE Under IDEIA

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning"

(Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

Here, there are significant flaws in the student's IEPs in effect since June 25, 2007. First and most significantly, throughout the student's educational history, the student has had profound difficulty in mathematics. (FF 5, 10, 19, 32, 37, 56, 61, 63, 69, 71, 73). Yet the District has never provided any goal or specially designed instruction to address this need. (FF 6, 15, 24, 36, 77, 89). It is almost incomprehensible that the student has gone for years without the District addressing the student's needs in mathematics through the IEPs, especially given the results of the District's own re-evaluation in April 2009. (FF 69, 71, 73).

Second, the student has a moderate-to-severe language disorder in both expressive and receptive language. (FF 7, 14, 22, 51, 57, 59, 72). Indeed, the independent neuropsychologist opined that the language disorder was a primary driver of the student's academic struggles. (FF 59). Yet the student went without any speech and language services for nearly two years, from October 2007 through August 2009. (22, 78, 90).

Third, the student exhibited a profound reading disability that was complex and multi-faceted and that ranged across all elements of reading ability (decoding, fluency, accuracy, and comprehension). (FF 4, 5, 9, 10, 18, 19, 32, 56, 63, 68, 71, 73). Yet from June 25, 2007 through August

25, 2010, the student had only one reading goal, in reading fluency, a goal which did not change from the 2006-2007 and 2007-2008 school years. (FF 12, 20, 23, 34). There has never been a goal in reading comprehension.

Fourth, even though the student has exhibited deep learning disorders, and some evidence of regression over breaks, the District has never offered ESY programming; more to the point, the District has never undertaken a focused data-gathering inquiry over extended breaks (namely over the winter holidays, as is customary) to determine if the student had regression/recoupment issues. (FF 16, 28, 39, 79, 94). Here, too, the District has never complied with the regulatory provisions of 22 PA Code §14.132(d)(2-3) requiring that, in every school year, the IEP team meet by February 28th to discuss ESY issues and the NOREP regarding ESY programming be issued by March 31st.

Accordingly, the student has been denied a FAPE since June 25, 2007 through the date of this order. An award of compensatory education will be fashioned accordingly.

Provision of FAPE Under Section 504

Section 504 defines a handicapped person, the qualifying term for Section 504 eligibility, as an individual having "a physical or mental impairment which substantially limits one or more major life activities". 34 C.F.R. §104.3(j)(1). A public school district receiving federal funding must provide a free appropriate public education to any handicapped person who is a student in the district. 34 C.F.R. §104.33.

Clearly, the student in this case qualifies for protection under Section 504. Furthermore, the litany of prejudicial acts and omissions outlined in the previous section (a litany which will not be repeated here) substantiates the finding that the District denied the student a FAPE under the terms of Section 504 as well as the IDEIA.

Accordingly, there will be a finding that the District denied the student a FAPE under the terms of Section 504.

Discrimination Under Section 504

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) he is disabled or has a handicap as defined by Section 504; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. Ridgewood; W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

In the instant case, the student qualifies under the provisions of Section 504 as an individual with a disability who is otherwise qualified to participate in school activities. (FF 1). While evidence as to the District receiving federal funding was not made part of the record, the hearing officer takes judicial notice that the District, as with every public school district and intermediate unit in Pennsylvania, receives federal financial assistance (directly from the federal government and/or through the Pennsylvania Department of Education) as part of its funding. Finally, the District knew the student had various disabilities and, indeed, was providing services as a result of those disabilities. (FF 1, 8, 17, 29, 62, 75, 85).

Therefore, the only point under the Section 504 discrimination analysis is whether the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school. In this case, this hearing officer finds that the student was subject to discrimination based on disability.

The most glaring examples are the issues involved in the mandatory "standards classes". In 2008-2009, the student was required to take Standards English and Standards Math; both classes were the direct result of the effects of the student's disabilities on learning. (FF 1, 42, 43, 44, 62, 71, 73). To the extent that these classes counted toward English and math credits required for graduation, there is no discrimination; but to the extent that these classes are not counted toward English and math credits and, instead, are used to meet elective requirements, the District conduct is discriminatory. (FF 44, 45).[3]

In the 2009-2010 school year, however, the discriminatory effect was clearly seen in the arduous schedule that that student was forced to endure as a result of the mandated standards classes. The necessity of scheduling a math class (geometry), two English classes (English and Standards English), and required science and physical education classes, all in half a day, left only the option (if the student was not to miss other instructional time) that the student receive speech and language services before school. (FF 88, 90). Most imposing on the student, however, was the requirement that the student attend a mandatory class—Standards Math—for nearly three hours per week after the end of the school day. (FF 89).

There can be no clearer line of causation: the District ignored the student's learning disability in math, the student continually scored below basic on PSSA testing, the District mandated that the student take Standards Math, the Standards Math class available for vo-tech students was offered only Mondays and Wednesdays from 3:30 – 5: 00 PM, and so the student, solely by reason of the student's disability, is required to complete mandatory coursework after the end of the school day. (FF 1, 6,

[3] It is unclear from the evidence presented how many credits students earn for Standards English and Standards Math and whether those credits count toward academic requirements for graduation or elective requirements for graduation. Should it be the latter, it is completely incongruous to "require" an "elective" course.

15, 19, 24, 32, 36, 37, 42, 43, 44, 46, 62, 69, 71, 73, 77, 88, 89). This is discrimination under Section 504.

Accordingly, there will be a finding that the District discriminated against the student under the terms of Section 504.

Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." (M.C. at 397).

Here, the District has denied the student a FAPE from June 25, 2007 onward. There are, however, varying degrees of deprivation.

From June 25, 2007 through the date of this decision, there has been no goal or specially designed instruction to address the student's learning disability in mathematics. The student's dreadful results on the PSSAs and the woeful results of every achievement evaluation bear out the result of this deprivation. Therefore, the student is entitle to an hour-for-hour award of compensatory education for all math instruction from June 25, 2007 through the end of the 2009-2010 school year. The calculation for this aspect of the compensatory education award shall include the instructional time for standards math in the 2008-2009 and 2009-2010 school year, as well as the regularly scheduled mathematics classes.

From June 25, 2007 through August 26, 2009, the student received no substantive speech and language services when the student's severe needs in expressive and receptive language arguably lie at the heart of the student's complex interplay of disabilities. Therefore, the student is entitled to one hour per school day over this period for the nature of the disability and its pervasive effect on the student's learning across all educational environments.

Data on the student's regression/recoupment has never been obtained, nor has the District complied with the ESY programming timelines under Pennsylvania regulations. Given the complex interplay between the student's ADHD, language disorders, and learning disabilities, and the student's need for concrete, sequential, atomized instruction with heavy repetition, it is clear the student needs an educational component over the summers to maintain skills and knowledge in reading, mathematics and writing. Therefore, the student will be awarded 75 hours of compensatory education for the four summers from 2007 through 2010.[4]

As for the nature of the compensatory education award, the parents may decide in their sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

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[4] The calculation is based on fairly standard types of ESY programming to serve a student such as this: 3 hours per day each day for a period of five weeks over the summer (e.g., from June 20 – August 1). So the calculation for ESY programming reduces to 3 hours per day x 5 days per week x 5 weeks = 75 hours.

CONCLUSION

The District has denied the student a FAPE for numerous acts and omissions over the period June 25, 2007 through the date of this order. As such, an award of compensatory education is owed. Additionally, the District has denied the student a FAPE under the terms of Section 504 and has engaged in discrimination against the student as a result of the student's disabilities under the terms of Section 504.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to an award of compensatory education, subject to the nature and limits set forth above, calculated as follows:

Hour-for-hour for each hour of mathematics instruction for the 2007-2008, 2008-2009, and 2009-2010 school years, including the time spent in the Standards Math classes in the 2008-2009 and 2009-2010 school years, plus

One hour per school day for the period June 25, 2007 through August 25, 2009 for the denial of speech and language services, plus

300 hours representing the denial of ESY programming to the student for the summers 2007-2010 (inclusive).

Additionally, as set forth above, the Susquenita School District has (a) denied the student a free appropriate public education and (b) discriminated against the student on the basis of the student's disabilities, both in violation of its obligations under the relevant portions of the Rehabilitation Act of 1973.

Finally, within 20 days of the date of this order, the student's IEP team shall meet to design an IEP for the student. The IEP team shall consider all pertinent evaluations and re-evaluations in drafting an appropriate IEP for the student for the 2010-2011 school year.

The student's program in reading for the recovery period was reasonably calculated to yield meaningful education benefit and was implemented appropriately.

Any claim by the parties not addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

June 12, 2010